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No. 93-981

In the Supreme Court of the United States

OCTOBER TERM, 1993

UNITED STATES OF AMERICA, PETITIONER

v.

RESHAT SHABANI

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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We explained in our petition that the Ninth Circuit's decision, which holds that the drug conspiracy statute, 21 U.S.C. 846, requires proof of an overt act in furtherance of the conspiracy, conflicts with the decisions of 11 other circuits. Pet. 13 & n.8. Respondent acknowledges that conflict (Br. in Opp. 2), as did the Ninth Circuit (Pet. App. 4a & n.1). We also explained that the Ninth Circuit's decision cannot be reconciled with the text of Section 846, which contains no overt act requirement, or with this Court's decisions in *Singer* v. *United States*, 323 U.S. 338 (1945), and *Nash* v. *United States*, 229 U.S. 373 (1913), which make clear that a criminal conspiracy statute that does not contain an express overt act requirement does not require proof of an overt act.

Pet. 5-12. Respondent does not challenge that submission, and the Ninth Circuit admitted that "[its] recent cases requiring proof of an overt act stand on weak ground." Pet. App. 4a. This Court should correct the Ninth Circuit's error and resolve the acknowledged conflict among the circuits.

1. Respondent contends that the question presented here is not an important and recurring one. That contention does not withstand scrutiny.

a. Respondent relies primarily (Br. in Opp. 3-4) on the fact that in some cases the Ninth Circuit has applied "harmless error" analysis to uphold convictions under 21 U.S.C. 846, despite the trial court's failure to instruct the jury that proof of an overt act was required. As we have explained, however, in other cases, including this one, the Ninth Circuit has reversed convictions under Section 846 because of the trial court's failure to give an overt act instruction. See, *e.g.*, *United States* v. *Foster*, 978 F.2d 716 (Table), petition for cert. pending, No. 93-1004 (filed Dec. 22, 1993); *United States* v. *Simpson*, No. 92-10155 (9th Cir. Nov. 30, 1993). Thus, the Ninth Circuit's erroneous interpretation has led to the reversal of valid convictions, and will no doubt continue to do so unless corrected.

Moreover, the consequences of the Ninth Circuit's error are not limited to the reversal of valid convictions. By requiring trial courts in prosecutions under 21 U.S.C. 846 to instruct the jury that proof of an overt act is required, the Ninth Circuit's decision allows the acquittal of some defendants who have committed the offense proscribed in Section 846. The Ninth Circuit's decision thus thwarts Congress's intention to punish those who conspire to commit

drug offenses even in the absence of proof of an overt act.

b. Respondent observes (Br. in Opp. 5) that in at least one decision the Ninth Circuit has held that proof of an overt act is not required under a conspiracy statute that, like 21 U.S.C. 846, does not contain an express overt act requirement. See also Pet. App. 4a (citing *United States* v. *Skillman*, 922 F.2d 1370, 1375 (1990) (proof of overt act is not required under civil rights conspiracy statute, 18 U.S.C. 241), cert. dismissed, 112 S. Ct. 353 (1991)). The need for further review of the Ninth Circuit's erroneous interpretation of 21 U.S.C. 846, however, is not diminished by the fact that the Ninth Circuit has interpreted other conspiracy statutes correctly. As the panel recognized, the Ninth Circuit's decisions concerning other conspiracy statutes that do not contain an express overt act requirement confirm that the Ninth Circuit erred in holding that proof of an overt act is required under Section 846. Pet. App. 4a. Moreover, the inconsistency in the Ninth Circuit's approach will create confusion and uncertainty in prosecutions under conspiracy statutes that do not contain an express overt act requirement and in which the question whether proof of an overt act is required has not yet been resolved. Cf. *United States* v. *Thomas*, 8 F.3d 1552, 1560 (11th Cir. 1993) (noting conflict among the circuits on the issue of whether proof of overt act is required to establish Hobbs Act conspiracy, 18 U.S.C. 1951).

2. Petitioner suggests (Br. in Opp. 5) that the Ninth Circuit might resolve the question presented here by granting rehearing en banc in some future case. As we explained in our petition (at 15), however,

that possibility is extremely remote. The Ninth Circuit denied rehearing en banc in this case despite the panel's criticism of the Ninth Circuit's position on the question presented here and despite Chief Judge Wallace's separate concurrence urging the Ninth Circuit "to take this issue en banc and to align itself with every other court of appeals." Pet. App. 9a; see also *United States* v. *Baker*, No. 89-10302 (9th Cir. Dec. 13, 1993), slip op. 14019 n.22 ("Although every other circuit has held that an overt act is not an element of a § 846 drug conspiracy, this court continues to differ.") (citing *Shabani*). Under these circumstances, the Ninth Circuit's denial of rehearing en banc strongly suggests that the Ninth Circuit's error will not be corrected by the en banc process.

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For the foregoing reasons and those stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted.

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Solicitor General

JANUARY 1994